



Upper Tribunal  
(Immigration and Asylum Chamber)

Appeal no: DA/00058/2017

**THE IMMIGRATION ACTS**

Heard at Field House  
on 29.01.2018

Decision and Reasons Promulgated  
On 30.01. 2018

Before:

Upper Tribunal Judges  
John FREEMAN and Clive LANE

Between:

Carolina VELÁZQUEZ Bastidas  
(Anonymity direction not made)

appellant

and

Secretary of State for the Home Department

respondent

Representation:

For the appellant: *Philip Nathan* (counsel instructed by Oaks)

For the respondent: Mr Esen Tufan

**DECISION AND REASONS**

This is an appeal, by the respondent to the original appeal, against the decision of the First-tier Tribunal (Judge Peter Herbert OBE), sitting at Hendon on 16 August 2017, to allow a deportation appeal by a citizen of Colombia, born 31 July 1981. The appellant had been here since 2005 on a residence card as the wife of an Italian citizen, with a gap from 2010 – 11, as her husband’s own residence had been broken by his detention from 2006 – 10 in Ecuador. In March – April 2015 she had been involved, in what the sentencing judge was prepared to accept was a ‘lesser rôle’ under the guidelines, in a conspiracy to supply 1 kg of cocaine, which at 70% he described as ‘import purity’, and following her conviction by the jury, on 10 December was sentenced to five years’ imprisonment.

2. That is enough to show that the appellant was extremely lucky in the judge’s decision; but it was not one which was or could have been challenged as one which no reasonable judge could have made on the basis he did. This was that, in terms of the principles set out in

NOTE: (1) *no anonymity direction made at first instance will continue, unless extended by me.*  
(2) *persons under 18 are referred to by initials, and must not be further identified.*

the Immigration (European Economic Area) Regulations 2016, at reg. 27 (5), she no longer presented a 'genuine, present and sufficiently serious threat' to justify her deportation. Obviously in a non-EEA case she would have needed to satisfy the requirements of s. 117C (6) of the Nationality, Immigration and Asylum Act 2002; but there is the difference.


3. The judge's decision was challenged in the First-tier Tribunal on the basis of an authority which, as the permission judge pointed out, did not deal with the grounds on which the judge had reached his conclusion in this case. Permission was granted in the Upper Tribunal, and time extended by one day, on the basis of grounds complaining about the judge's description of the view reached in the Offender Assessment System [OASys] assessment (13 April 2017) on which he relied as being that of the respondent's own expert.
4. This was of course now incorrect, as responsibility for 'offender management', as probation and prison services are now known, was transferred some years ago from the Home Office to the Ministry of Justice. However, as Mr Tufan realistically agreed, the administrative location of the authority responsible for the OASys report could not have any material effect on the expertise, or otherwise of the person who drafted it. The appeal before us must stand or fall on how the judge dealt with the case, including the report, on its merits; and this was the only ground on which permission was granted.
5. No doubt with that in mind, Mr Tufan, who no-one could have accused of lack of industry in his own dealings with this case, had come prepared with several authorities which appeared to raise additional points. Notice of hearing had been given for today on 21 December, with the standard directions. Though those may be more appropriate to the usual case of an appellant's onward appeal, both parties should be well aware that the case which the other side will come prepared to deal with is the one on which permission has been granted.
6. In this case, no notice of any additional grounds had been given, and there was no draft of any before us. When we went into Mr Tufan's additional points with him, the case he wanted to make turned out to be that the judge had been wrong to deal with the OASys report as he did at 69, on the basis that the evidence before him showed that the appellant was "... fully remorseful and has dealt successfully with her offending behaviour to the extent that her risk of reoffending is now as low as between 3% and 5% ..." (as assessed at p 34).
7. The basis on which Mr Tufan proposed to make this point was taken from paragraph 2.14 (at p 11) of the OASys report: the police had seized a very large sum of money (apparently over £160,000), found in bundles at her home address, whose presence there she had been unable to explain. She also continued to deny responsibility for the offence, giving (see 2.11) a quite different account, which the jury had clearly refused to accept, of how she had come to the house where the cocaine was delivered.

8. The author of the report had taken this into account at 2.14, but concluded “However, given the nature of her offence, and the lack of any previous convictions suggesting any escalation in offending behaviour, I would not consider [the appellant] to pose any risk of serious harm. While the appellant’s denial of responsibility at the date of her trial was of course clear, there is nothing in the sentencing judge’s remarks about any money found at her house, and there is nothing to suggest that this passage in the report was drawn to the judge’s attention. He was of course free to accept or reject the writer’s conclusions, and, if he had accepted them on a wrong basis, then his decision would have been open to challenge.
9. However, Mr Nathan, who, unlike Mr Tufan, appeared before the judge pointed out two things: first, there was evidence in her own statement and those of her family members that by the date of the hearing (four months after the OASys assessment) the appellant had changed her mind and repented of her crime. Second, the presenting officer had declined to cross-examine her, or the other witnesses. Mr Nathan suggested that the judge had been entitled to accept this evidence, as he apparently did at 69, together with the very good reports on her from the prison authorities, to which he refers at 58 - 61.
10. While the appellant, and her witnesses, could reasonably have expected to face vigorous cross-examination on her rather recent change of heart, the judge was also entitled to expect that to happen, if it were to be challenged. That is the stage at which Mr Tufan’s point should have been taken. While it is a perfectly valid and serious one, it was neither raised in the grounds of appeal before us, nor any notice of it given to those representing the appellant. Bearing in mind both the overriding objective to deal with cases fairly and justly, and the parties’ obligation to
  - (a) help the Upper Tribunal to further the overriding objective; and
  - (b) co-operate with the Upper Tribunal generally.

we declined to allow the necessary (undrafted) amendment

11. Since, as Mr Tufan accepted, the grounds of appeal as they stand raised no arguable error of law on the part of the judge, the result is that this appeal is dismissed. We hope that the appellant will take due warning from what has happened, because it is quite inconceivable that she could be so lucky again.

**Respondent’s appeal dismissed**



29 January 2018 (a judge of the Upper Tribunal)